No. 96-1013

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JACK B. BUSTER; JANICE SUE JOHNSON; HORIZONS WEST, INC.; SCORPIO, INC.; WESTERN INVESTMENT TRUST; SUSAN BENDICT, Trustee of Western Investment Trust; and WESTWOOD ACRES, an Alaskan Limited Partnership,

Petitioners,

vs.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN and HENRY P. HEAD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision below is consistent with Alaska Supreme Court decisions that implicitly and expressly authorize judgment creditors to maintain supplementary fraudulent conveyance proceedings.

2. Whether the decision below conflicts with the decision of this Court in *Peacock v. Thomas*, __ U.S. __, 116 S. Ct. 862 (1996).

3. Whether this Court should accept certiorari to reconsider the factual determinations made below.

4. Whether this Court should accept certiorari to consider issues involving principles that are only important to the parties.

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STATEMENT OF THE CASE

This case stems from a supplementary proceeding to set aside fraudulent conveyances. The original lawsuit was initiated on March 7, 1989. Respondents Thomas, Head & Greisen Employees Trust, Ronald E. Greisen and Henry P. Head brought suit against Jack B. Buster, Terry D. Parks and Northern Financial. After a bench trial the district court entered findings of fact and conclusions of law in favor of the Thomas, Head & Greisen Employees Trust, Ronald E. Greisen and Henry P. Head (hereinafter "the Trust"). The district court concluded the Trust was an employee trust for Thomas, Head & Greisen, a professional corporation, and was organized and operated pursuant to ERISA. The district court also concluded petitioners Buster *et al.* were fiduciaries under ERISA; petitioners breached their fiduciary duties to the Trust; and petitioners were liable for damages suffered by the Trust. On August 17, 1992, the district court entered final judgment awarding the Trust $142,745.71 plus costs, attorney fees, and post judgment costs. The findings of fact and conclusions of law of the district court were affirmed by the Ninth Circuit Court of Appeals. *See Thomas, Head & Greisen Employees Trust v. Buster,* 24 F.3d 1114 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 935 (1995).

Petitioner Jack B. Buster (hereinafter "Buster"), in concert with the defendants to the supplementary proceeding, committed a long running series of acts calculated to frustrate the efforts of the Trust to collect on the judgment. This series of acts included both prejudgment and post-judgment transfers of Buster's assets. The transfers were effectuated by Buster. These acts resulted in a fraudulent conveyance action being filed against Buster and the other defendants to the supplementary proceeding. This fraudulent conveyance action is the subject of this proceeding.

In the supplementary fraudulent conveyance proceeding, (hereinafter "Supplementary Proceeding") the district court on August 4, 1983 granted the Trust's request for a preliminary injunction. (RA. 1a.)[1] Specifically, the district court determined there was an appreciable risk that Buster, or the other defendants to the Supplementary Proceeding would cause additional transfers to be made or would dispose of assets which the Trust alleged were fraudulently conveyed by Buster, or the other impleaded defendants. (RA. 2a.) The preliminary injunction froze certain assets and required that Buster and the other defendants deposit $125,000 into the court registry. The $125,000 was, at one time, in the possession of Buster's attorney. The district court determined there was a substantial likelihood that the $125,000 were the proceeds of fraudulently conveyed assets. (RA. 3a.) Neither Buster nor the defendants to the Supplementary Proceeding appealed the preliminary injunction.

When Buster and the defendants to the Supplementary Proceeding failed to deposit the $125,000 in the registry of the court, or show cause for their failure to do so, the district court held them in contempt, and declared them in default. (A. 3.) Approximately one year after the entry of the district court's preliminary injunction, and after Buster and the defendants to the Supplementary Proceeding failed to cure the default, the district court entered default judgment against Buster and the defendants to the Supplementary Proceeding. (B. 1.)

The default judgment set aside numerous asset transfers, including the transfer of Buster's limited partnership interest in Westwood Acres. Buster is the general partner of Westwood Acres. The default judgment also directed Westwood Acres to

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1. All references to the appendix to Respondents' Brief in Opposition will be identified by "RA" and the page number. All other references are to the appendix to Petitioners' Petition for Writ of Certiorari.

pay to the Trust all present and future shares and all distributions, credits, draws or payments that would have been paid to Buster until the judgment was satisfied. Although Westwood Acres had notice of the proceedings through its general partner Buster, Westwood Acres did not move to intervene until May 18, 1995. Westwood Acres then filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(4), on June 6, 1995.

During the time period in which Westwood Acres was silent, Buster diligently fought the Trust's efforts to obtain discovery regarding the distributions from Westwood Acres. Moreover, Buster, in his capacity as general partner of Westwood Acres, was covertly making distributions which violated the terms of the default judgment. It was only after the Trust learned of the unauthorized distributions and took steps to recover the distributions that Westwood Acres moved to intervene.[2] The district court denied Westwood Acres' Rule 60(b)(4) motion. (A. 5.)

SUMMARY OF ARGUMENT

None of the special and important reasons which may warrant a grant of a writ of certiorari exist in this case. In upholding the district court's decision to exercise jurisdiction over the Supplementary Proceeding, the Ninth Circuit Court of Appeals relied on two Alaska Supreme Court decisions in which the court interprets Alaska Rule of Civil Procedure 69. Further, after the Ninth Circuit Court of Appeals issued its opinion in this matter, the Alaska Supreme Court issued a decision that is

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2. The district court entered contempt sanctions against Buster and his former wife, Janice Sue Buster as a result of the unauthorized distributions and the subsequent dissipation of these funds. These sanctions are currently the subject of another appeal to the Ninth Circuit Court of Appeals.

consistent with the position adopted by the Ninth Circuit Court of Appeals. Accordingly, there is no conflict with the decisions of the Alaska Supreme Court.

In upholding the district court's exercise of subject matter jurisdiction, the Ninth Circuit Court of Appeals did not render a decision which is in conflict with *Peacock v. Thomas*, __ U.S. __, 116 S. Ct. 862 (1996). In *Peacock*, this Court reasoned that federal district courts do not possess ancillary jurisdiction over claims where the judgment creditor is attempting to establish a new defendant's liability for the original judgment. *Peacock*, __ U.S. at __, 116 S. Ct. at 868-69. This Court declined to consider the issues present in this case. 116 S. Ct. at 868 note 6.

Moreover, this Court in *Peacock*, reiterated its approval of the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of a federal judgment. Thus, *Peacock* is actually consistent with the opinion of the Ninth Circuit Court of Appeals in this matter.

Finally, the remaining issues were settled predominantly by factual determinations made by the district court. The Ninth Circuit Court of Appeals affirmed the factual determinations. The Ninth Circuit Court of Appeals was not required to construe or interpret matters of law in a manner that is in conflict with the decisions of this or other circuit courts. Moreover, the issues raised by Petitioners do not involve principles the settlement of which is of importance to the public as distinguished from the parties. In short, this matter does not merit discretionary review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE ALASKA SUPREME COURT.

Only very special cases merit this Court's discretionary review on writ of certiorari. Sup. Ct. R. 10. This dispute is not a special case. The court below correctly determined all questions of state law. Earlier this century, this Court stated, "We had occasion to point out the importance to the orderly judicial administration of state laws in the federal courts that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review." *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944). Further, this Court has frequently deferred to the views of the courts of appeals on issues of local law as being those of an expert tribunal as to the laws of the states within their circuits. *Bunter v. United States,* 440 U.S. 48, 58 (1979).

In affirming the district court's exercise of jurisdiction over the Supplementary Proceeding, the Ninth Circuit Court of Appeals relied on two Alaska Supreme Court decisions which upheld a trial court's exercise of jurisdiction over supplementary proceedings which were not expressly authorized by Alaska Rule of Civil Procedure 69. In *Keltner v. Curtis,* 695 P.2d 1076 (Alaska 1985), a judgment creditor sought to execute on property within the judgment debtor's possession. Third parties filed claims to the property under Alaska Statute § 09.35.130. An evidentiary hearing was held by the trial court to resolve the ownership dispute. The Alaska Supreme Court upheld the lower court's jurisdiction, reasoning that, although A.S. § 09.35.130

did not grant the court authority to determine title to the property, it had the inherent power to do so because the ownership determination was "reasonably necessary to the fair administration of justice." *Id.* 1079 n. 4.

Similarly, in *Great Western Savings Bank v. George W. Easley Co.*, 778 P.2d 569 (Alaska 1989), the trial court entered an order subordinating a construction lenders deed of trust to a general contractors mechanic's lien. On appeal, the Alaska Supreme Court ruled that because it was affirming a money judgment against the lender, "the order of subordination can be viewed as an order in aid of collection of the judgment which is within the inherent power of the court." *Id.* at 581. The Alaska Supreme Court states, "[a] court of equity has power to entertain an action which has for its purpose the enforcement of a judgment in order that complete justice may be done to the parities in interest as to the exigencies of the case or the interests of justice may require." *Id.* at 581 n. 12.

The Ninth Circuit Court of Appeals was persuaded the Alaska Supreme Court would permit the Trust to bring its fraudulent conveyance claims in a Supplementary Proceeding. This determination merits no review, particularly in view of the fact that this Court ordinarily defers to the views of the courts of appeals on issues of local law as being those of an expert tribunal on the laws of the state within their circuit. *Bunter*, 440 U.S. at 57-58. Moreover, the Alaska Supreme Court has recently issued an opinion that is consistent with the opinion of the Ninth Circuit Court of Appeals.

In *Denali Fed. Credit Union v. Lange*, No. 4413 (Alaska Oct. 17, 1996).[3] A judgment creditor moved for a writ of

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3. A copy of this slip opinion is attached in the appendix for the Court's convenience.

execution on a judgment against two properties which a judgment debtor had conveyed to his wife. *Id.* at 3. Judgment debtor's wife moved to intervene and requested a trial on the question of whether judgment debtor had any interest in the property. *Id.* Judgment creditor alleged the conveyance of the properties was fraudulent. *Id.* The trial court denied judgment creditor's motion for a writ of execution without conducting an evidentiary hearing on the fraudulent conveyance issue. *Id.* The Alaska Supreme Court held the trial court should have resolved the fraudulent conveyance issue before the trial court ruled on judgment creditor's motion for a writ of execution. *Id.* at 5. The Alaska Supreme Court remanded the case to the trial court for trial of the fraudulent conveyance issue. *Id.* The *Lange* decision is consistent with the Ninth Circuit Court of Appeal's determination in this case that the supplementary fraudulent conveyance proceeding is authorized under Alaska law.

II.

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners assert that this Court's opinion in *Peacock v. Thomas*, __ U.S. __, 116 S. Ct. 862 (1996) is controlling. However, this Court simply held in *Peacock* that absent an independent basis for federal jurisdiction, a new defendant may not be joined in a supplementary proceeding to pierce the corporate veil. *Peacock*, 116 S. Ct. at 867-69. This Court reasoned that federal district courts do not possess ancillary jurisdiction over such claims where the judgment creditor is attempting to establish the new defendant's liability for the original judgment. *Id.* at 868-69.

The Ninth Circuit Court of Appeals determined *Peacock*

was distinguishable because the trust was not attempting to establish liability on behalf of the defendants to the supplementary proceeding for the original judgment. Rather, the Trust was seeking to disgorge from Petitioners property that was fraudulently transferred to them. The Ninth Circuit Court of Appeals did note that this Court expressly declined to address the issue presented in this case. *Peacock,* 116 S. Ct. at 868 n. 6.

Moreover, *Peacock* is consistent with the opinion of the Ninth Circuit Court of Appeals in this matter. This Court noted in *Peacock* that, "[w]e have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments. . . ." *Id.* at 868. Similarly, the exercise of jurisdiction in this case is a proper use of the federal court's inherent power to enforce its judgments. Thus, *Peacock* is consistent with the opinion of the Ninth Circuit Court of Appeals in this matter.

III.

FACTUAL DISPUTES AND ASSERTIONS THAT A COURT MISAPPLIED A PROPERLY STATED RULE OF LAW DO NOT MERIT REVIEW BY THIS COURT.

This Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon analysis of the particular facts involved. This Court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). This Court is even less likely to take a case to review a factual issue where the findings of fact made by the district court received the concurrence of the court of appeals. In that situation, this Court has stated, "A court of law, such as this court is, rather than a court for correction of errors in fact finding,

cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court has made it very clear that,

> [i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). The present case does not fall under either heading.

Petitioners argue the court below did not comply with various legal standards. However, the courts below decided the majority of the issues on the basis of factual determinations. There were no erroneous legal determinations. Moreover, the decision below neither presents a real or embarrassing conflict with other authorities or presents issues the settlement of which is of importance to the public as distinguished from the parties.

A. The Preliminary Injunction

Upon entering the preliminary injunction, the district court found,

> Jack B. Buster's counsel, A. Lee Petersen, was in possession of $125,000.00 that this court understood was to be used by defendant

> Buster in order to post a supersedeas bond. Based on evidence presented to this court, there is a substantial likelihood that the $125,000.00 are proceeds of transferred assets which are the subject of plaintiff's fraudulent conveyance action and covered by the February 19, 1993, temporary restraining order. **There is an appreciable risk that defendant Jack Buster or the other impleaded defendants will dispose of these funds prior to resolution of plaintiff's fraudulent conveyance action.** If these funds are dissipated, irreparable harm will be incurred by plaintiffs.

(RA. 3a.) (Emphasis added.) Petitioners are asking this Court to reconsider the district court's conclusion that the Trust would suffer irreparable injury. This factual finding received the concurrence of the court of appeals. Thus, this conclusion merits no review by this Court. Petitioners claim the district court granted the preliminary injunction without any showing that the Trust would suffer irreparable injury. However, the Ninth Circuit Court of Appeals concluded,

> The record clearly reveals that there is no merit in Buster's contentions that the district court failed to consider the requisite factors for preliminary injunctive relief — i.e., the likelihood of success on the merits and irreparable injury — and that the district court failed to give Buster notice that the injunction could include the requirement of a $125,000.00 deposit with the registry of the court.

(A. 22.)

Petitioners also claim that as to "the Johnson parties" the deposit requirement was clearly a prejudgement attachment of their property. Further, they claim the court did not hold a hearing as required. However, the Ninth Circuit Court of Appeals found,

> The court heard argument on the proposed injunction and found that Thomas, Head's fraudulent conveyance claims were likely to succeed. The Johnson parties claim in no way implicates the court's inherent authority or jurisdiction to enter an order to preserve the possibility of equitable remedies. . . . The $125,000.00 does not represent a money judgment for damages.

(A. 25.) Petitioners repeatedly overlook the finding of the district court that there was a substantial likelihood that the $125,000 were the proceeds of fraudulently conveyed assets. (RA. 3a.) Petitioners' characterization of the preliminary injunction as a prejudgment attachment is simply another means of asking this Court to reconsider this evidentiary determination.

Accordingly, the issuance of the preliminary injunction merits no review by this Court. Additionally, it is important to note that the Petitioners failed to appeal the entry of the preliminary injunction. Rather, Petitioners challenged the preliminary injunction on appeal of the default judgment.

B. The Default Judgment

The decision below upholding the entry of default judgment was based on several facts and what the Ninth Circuit Court of Appeals termed, "the overwhelming evidence supporting Thomas, Head's request." (A. 33.) The facts supporting the entry of default judgment are as follows:

1. The district court expressly requested briefing in response to the Trust's motion for an order to show cause;

2. Buster failed to respond to the court's request;

3. Although the other Petitioners did file a brief, they presented no admissible evidence to support their claim they could not comply with the preliminary injunction;

4. The record reflects that Petitioners did not request a hearing in response to the Trust's motion for an order to show cause;

5. The district court's order provided that default would be vacated upon compliance with its preliminary injunction; and

6. Petitioners failed to comply throughout the following year prior to the entry of default judgment.

(A. 27-31.)

The decision to enter default judgment was based on these facts. Any review of the appropriateness of the default judgment would require a review of the evidence and discussion of the specific facts. Ordinarily, this Court does not grant certiorari to review evidence and discuss specific facts. *Johnston*, 268 U.S. at 227. Accordingly, discretionary review is not warranted.

Petitioners argue the district court did not adhere to a "five step process" before imposing sanctions. Petitioners made this same argument below. However, the Ninth Circuit Court of Appeals determined Petitioners "had ample notice and opportunity to respond to the possibility that the court would find them in contempt." (A. 32.) The Ninth Circuit Court of

Appeals was persuaded by the fact that Petitioners had not asked for an evidentiary hearing in response to the Trust's motion for an order to show cause. (A. 32.) Also, the district court's order provided that default would be vacated upon compliance with its preliminary injunction and Petitioners failed to comply throughout the following year. (A. 32.) Additionally, Petitioners presented no admissible evidence to support their claim they could not comply with the preliminary injunction. These facts support the entry of default judgment without an evidentiary hearing.

C. Westwood Acres' Rule 60(b)(4) Motion

The default judgment set aside Buster's transfer of certain interests in Westwood Acres, and directed Westwood Acres to pay to the Trust all present and future shares and all distributions, credits, draws or payments which would have paid to Buster for his general and/or limited partnership interest in Westwood Acres until the underlying judgment was satisfied. Westwood Acres raises several arguments based on the theme that the default judgment affected its property and that the court lacked jurisdiction because Westwood Acres was not a party to the proceeding.[4]

Federal Rule of Civil Procedure 60(b), provides in relevant part "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

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4. Westwood Acres argues at some length that orders appointing a receiver for Westwood Acres violated provisions of Alaska Law. However, Westwood Acres did not appeal these orders. The Ninth Circuit Court of Appeals determined the issues were not before it on appeal. Accordingly, they are not properly the subject of briefing to this Court. The only issue properly before this Court was Westwood's claim that the default judgment was void under Federal Rule of Civil Procedure 60(b)(4).

judgment, order, or proceeding for the following reasons: . . . . (4) If the judgment is void; . . . ." A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law. *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985). As discussed above, the determination of the Ninth Circuit Court of Appeals that it had subject matter jurisdiction is not in conflict with a decision of this Court and does not merit this Court's discretionary review. Additionally, the court had supplementary jurisdiction pursuant to Alaska Rule of Civil Procedure 69, to hear the fraudulent conveyance proceeding.

The Ninth Circuit Court of Appeals determined the default judgment did not deprive Westwood Acres of property without due process of law. This determination was based on the fact that Westwood Acres had no property right in the distributions to which Buster would otherwise have been entitled. This determination is contrary to the assertion of Petitioners that the district court invaded the limited partnership, its membership and property in the default judgment. To the extent the default judgment affected a property right of Westwood Acres to control the sale of the limited partnership interests in the partnership, the Ninth Circuit Court of Appeals determined that right was not violated because the general partner was involved in the proceedings. Further, Westwood Acres had notice of the proceedings through its general partner and could have intervened at an earlier date. Each of these determinations was necessarily based on a prediction by the Ninth Circuit Court of Appeals as to how the Alaska Supreme Court would decide these issues. These are not issues of federal law. As noted above, this Court ordinarily defers to the views of a court of appeals on issues of state law within its circuit. *Butner v. United States*, 440 U.S. 48, 58 (1979). Moreover, settlement of these issues is

not of importance to the public as distinguished from the parties. For these reasons, this issue does not merit this Court discretionary review.

CONCLUSION

For the reasons discussed above, Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — PRELIMINARY INJUNCTION FILED AUGUST 4, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A89-071 Civil

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD,

Plaintiffs,

v.

JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL,

Defendants.

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD,

Plaintiffs,

v.

Appendix A

JACK B. BUSTER, JANICE SUE BUSTER, a/k/a JANICE SUE JOHNSON, HORIZONS WEST, INC., an Oregon Corporation, DAVID J. BERG, MARJORIE A. BERG, CARL L. CASEY, SCORPIO, INC., an Alaska Corporation, WESTERN INVESTMENT TRUST, and SUSAN BENEDICT, TRUSTEE of the WESTERN INVESTMENT TRUST,

Defendants.

PRELIMINARY INJUNCTION

Upon motion of plaintiffs, this court finds and concludes that:

1. During the pendency of the *Thomas, Head & Greisen Employees Trust, Ronald E. Greisen and Henry P. Head v. Jack B. Buster, Terry D. Parks and Northern Financial,* Case No. A89-071 Civil, defendant Jack B. Buster has either transferred or caused to be transferred virtually all of his assets to Mr. Buster's wife, Janice Sue Buster, or entities owned by Janice Sue Buster. Some of these assets have now been transferred to other entities or individuals named as defendants in the above-captioned supplementary proceeding.

2. There is an appreciable risk that defendant Jack Buster or the impleaded defendants will cause additional transfers to be made or will dispose of assets which plaintiffs allege were fraudulently conveyed by Jack B. Buster and/or the other impleaded defendants. Defendant Buster is asserting that he is now insolvent. Therefore, the transferred assets may be the only assets which are available to satisfy plaintiffs' judgment. If additional transfers are made, or if the transferred assets are disposed of before plaintiffs' fraudulent conveyance proceeding

is resolved, irreparable harm will therefore be incurred by plaintiffs.

3. Jack B. Buster's counsel, A. Lee Petersen, was in possession of $125,000 that this court understood was to be used by defendant Buster in order to post a supersedeas bond. Based on evidence presented to this court, there is a substantial likelihood that the $125,000 are proceeds of transferred assets which are the subject of plaintiffs' fraudulent conveyance action and covered by the February 19, 1993 Temporary Restraining Order. There is an appreciable risk that defendant Jack Buster or the impleaded defendants will dispose of these funds prior to resolution of plaintiffs' fraudulent conveyance action. If these funds are dissipated, irreparable harm will be incurred by plaintiffs.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant/Debtor Jack B. Buster, as well as Defendants Janice Sue Buster, a/k/a Janice Sue Johnson, Horizons West, Inc., Carl L. Casey, Scorpio, Inc., Western Investment Trust and Susan Benedict, Trustee of the Western Investment Trust, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, are hereby forbidden from selling, transferring or in any manner disposing of any assets which Mr. Jack B. Buster or Scorpio, Inc. had an ownership interest in from February 29, 1989 forward which are not exempt from execution including, but not limited to Mr. Buster's ownership interest in any corporation or partnership which includes, but is not limited to, Scorpio, Inc., Photo Express Image Centers, Inc., Westwood Acres, Kavik Valdez, Kavik Kenai, and Kavik Mortgage until further order of this Court.

Appendix A

IT IS FURTHER ORDERED that Defendant/Debtor Jack B. Buster and Janice Sue Buster are hereby forbidden from seeking or obtaining an order or judgment from any court ratifying and enforcing the provisions of any instrument of conveyance including, but not limited to, the Separate Property Agreement entered into between Jack B. Buster and Janice Sue Buster.

IT IS FURTHER ORDERED that pending further order of this Court, the Defendants identified above are hereby forbidden from selling, transferring, or in any manner disposing of any real property, including the rents and profits produced by such real property, including but not limited to, the following:

Lot Twenty-Seven (27), WOODSIDE EAST UNIT NO. 2, according to Plat No. 73-101, being within the Anchorage Recording District, Third Judicial District, State of Alaska;

Tract Two (2) of T7N, R12W, Section 27, BIG SKY SUBDIVISION, according to the official plat thereof, filed under Plat No. 76-57, records of the Kenai Recording District, Third Judicial District, State of Alaska;

Portion of Alaska Tideland Survey 674, records of the Valdez Recording District, Third Judicial District, State of Alaska;

Section 14, T17N, R2E, Seward Meridian (M/B SE1/4), records of the Palmer Recording District, Third Judicial District, State of Alaska;

Appendix A

Lot Six "A" (6-A), Block Two (2), PEARL V. SMITH ADDITION, according to the official plat thereof filed under Plat No. P-5666, records of the Anchorage Recording District, Third Judicial District, State of Alaska;

Lots Nineteen (19) & Twenty (20), Block Three (3), and Lots Three (3) and Four (4), Block Six (6) BLACK GOLD SUBDIVISION, according to the official plat thereof filed under Plat No. K1399, records of the Kenai Recording District, Third Judicial District, State of Alaska;

Lots Ten (10) through Eighteen (18), Block One (1) and Lots Eleven (11) through Fifteen (15), Block Three (3) HIGHLAND SUBDIVISION, according to official Plan K-1542, Kenai Recording District, Third Judicial District, State of Alaska;

Tract Three (3), BIG SKY SUBDIVISION, according to the official plat thereof, recorded at Plat No. 76-57, in the Kenai Recording District, Third Judicial District, State of Alaska;

That portion of Southeast one-quarter (SE 1/4) of Section 14, Township 17 North, Range 2 East, Seward Meridian, being within the Palmer Recording District, Third Judicial District, State of Alaska described as follows:

Beginning at the Northeast corner of Lot 4 of parcel 1, of the revised Bodenberg Creek Subdivision according to the official plat on file in Book 12 at Page 282, run thence N 2° 11' 00" W a distance of 200.00 feet to the true point of beginning; thence S 89° 57' 00" W a distance of 100.00 feet; thence N 19° 08' 00" a distance of 676.60 feet to the

North-South centerline of said Section 14; thence 89° 57' 00" E a distance of 297.39 feet to the westerly right of way line of the Glenn Highway; thence S 2° 11' 00" E a distance of 639.82 feet to the true point of beginning.

IT IS FURTHER ORDERED that pending further order of this Court, the Defendants identified above are hereby forbidden from selling, transferring or in any manner disposing of the beneficial interest in and proceeds obtained from any deed of trust or deed of trust note covering the following property:

Lot Sixteen (16), Block Five (5), ROOSEVELT PARK SUBDIVISION, according to Plat No. P-57A, in the Anchorage Recording District, Third Judicial District, State of Alaska;

Lots Seventeen (17) and Eighteen (18), Block One (1), HIDEAWAY HAVEN SUBDIVISION, according to Plat 86-63, being within the Kenai Recording District, Third Judicial District, State of Alaska;

Lot Two (2), Block Two (2), CHAR-DEE SUBDIVISION, according to Plat 74-66, being within the Palmer Recording District, Third Judicial District, State of Alaska;

The West Seventh-Eight (78) feet of Tract Four (4), NELS SANDS SUBDIVISION, according to Plat P-53, being within the Anchorage Recording District, Third Judicial District, State of Alaska;

Real property within the Valdez Recording District, State of Alaska, known as A.T.S. No. 674: Beginning at Corner

Appendix A

No. 4 USS 495 thence S. 62° 55' 42" E. to Corner No. 1 a common corner to Corner No. 1 ATS 623 the true point of beginning, thence by metes and bounds: S. 10° 00' 00" E. 600.00 ft. to Corner No. 2 S. 80° 00' 00" W. 190.00 ft. to Corner No. 3 N. 10° 00' 00" W. 440.00 ft. to Corner No. 4 N. 80° 00' 00" E. 30.00 ft. to Corner No. 5 thence to the left along a curve whose radius is 20.00 ft. a distance of 31.42 ft. to Corner No. 6 thence No. 10° 00' 00" W. 100.00 ft. to Corner No. 7 thence to the right along a curve whose radius is 40.00 ft. a distance of 62.83 ft. to Corner No. 8 thence N. 80° 00' 00" E. 100.00 ft. to Corner No. 1 the true point of beginning, containing 2.428 acres. Approximate latitude at Corner No. 1 61° 07' 30". Approximate longitude at Corner No. 1146° 20' 30".

IT IS FURTHER ORDERED that the share certificates of Scorpio, Inc., shall be immediately delivered to this Court pending a determination by this Court as to whether the shares were fraudulently transferred by Mr. Buster to his wife, Janice Buster, or a corporation owned by Janice Buster.

IT IS FURTHER ORDERED that in view of the serious allegations that funds fraudulently have been transferred or dissipated by defendants which would be otherwise available to satisfy plaintiffs' judgment, defendants identified above are ordered to deposit $125,000 into the registry of the court on or before 12:00 p.m., August 9, 1993, these funds to be held by the Court pending a resolution of plaintiffs' fraudulent conveyance action.

This Preliminary Injunction shall remain in effect until further order of this Court.

Appendix A

IT IS SO ORDERED this 4th day of August, 1993, at Anchorage, Alaska.

s/ illegible
United States District Judge

CC:

FINANCIAL DEPUTY
A. L. Peterson
R. BLISS
M. Coryell

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF ALASKA IN *DENALI FEDERAL CREDIT UNION, ET AL. V. SUSANNE LANGE* DATED OCTOBER 17, 1996

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-6610

Superior Court No.
3AN-86-14997 CIV

[No. 4413 - October 17, 1996]

DENALI FEDERAL CREDIT UNION, formerly known as ALASKA RAILROAD FEDERAL CREDIT UNION,

Appellant,

v.

SUSANNE LANGE,

Appellee.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Reese, Judge.

OPINION

Appearances: Roy Longacre, Longacre & Associates, Anchorage, for Appellant. Jill Dean, Law Office of Jill Dean, Anchorage, for Appellee Susanne Lange.
Before: Compton, Chief Justice, Rabinowitz, Matthews and Eastaugh, Justices. [Fabe, Justice, not participating]

COMPTON, Chief Justice.

Appendix B

I. INTRODUCTION

Denali Federal Credit Union (Denali) appeals the superior court's denial of its motion for a writ of execution. We reverse.

II. FACTS AND PROCEEDINGS

In May 1985 Denali (formerly the Alaska Railroad Federal Credit Union) filed a civil action against William Lange, Lange's business partner Ted Hanson, and their partnership, Nugget Properties. Denali alleged the defendants were in default on loans totaling over $1 million.

In August 1985 William Lange conveyed his interest in four properties to his wife, Susanne Lange, for $10. She, in return, assumed personal responsibility for business debts of William Lange's unrelated to this action. There is evidence in the record that one of the four properties was worth $700,000.

In November 1985 William Lange and Hanson signed a confession of judgment for $1,070,000, plus interest, in Denali's favor. Denali agreed not to seek entry of judgment if William Lange and Hanson met the payment schedule established by the parties' settlement. William Lange and Hanson failed to make the first payment under the settlement schedule. Denali moved for entry of judgment. In February 1987 the superior court entered judgment against William Lange and Hanson for $1,187,700.

In 1991 Restaurants Northwest Inc. (RNI), a restaurant franchisee in which William Lange owned an interest, filed for bankruptcy. The bankruptcy proceeding focused in part on whether William Lange's 1985 transfer of property to his wife

violated RNI's right of first refusal to one of the properties. In the context of that issue, the bankruptcy court stated:

> Maybe what the implication here is that [William Lange] was in severe financial trouble, and [Susanne Lange] just wanted to get everything in her name because it was better for them. . . . I think they were trying to hide this from their creditors, but what they really did was transfer it to Mrs. Lange. And it was a transfer for essentially no consideration. It wasn't a, quote, purchase in the real world. It was just a transfer for their various purposes, which were distinct. She thought she had an interest in it. Secondly, she wanted to protect her family. Thirdly, it apparently wasn't going to hurt Mr. Lange anyway 'cause [sic] he was about to lose it. And fourthly, the [RNI] document didn't prevent transfer, it only . . . provided for a purchase.

In September 1993 Denali moved for a writ of execution on the 1987 judgment against two of the properties William Lange had conveyed to his wife. Denali alleged the conveyance was fraudulent. Susanne Lange moved for and was granted leave to intervene. She requested a jury trial on the question whether William Lange had any remaining interest in the properties.

The superior court denied Denali's motion without explanation or an evidentiary hearing. Denali appeals.

Appendix B

III. DISCUSSION

A. *Appellate Jurisdiction*

Susanne Lange argues that this court does not have jurisdiction to hear Denali's appeal because the superior court did not enter a final judgment. *See* Alaska R. App. P. 202(a) ("An appeal may be taken to the supreme court from a final judgment entered by the superior court . . . ") . The finality rule "does not necessarily require the entry of a final judgment." *Borg-Warner Corp. v. AVCO Corp.*, 850 P.2d 628, 635 (Alaska 1993). To determine finality, "the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment. . . ." *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030-31 Alaska 1972), *overruled on other grounds by City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 (Alaska 1979). A final, appealable "judgment" is one that, however denominated, "disposes of the entire case and ends the litigation on the merits." *Borg-Warner Corp.*, 850 P.2d at 634.

The superior court may have denied Denali's motion with the understanding that it could not be granted without first adjudicating the fraudulent conveyance issue. However, once the motion was denied, "there was nothing that [Denali] could do to further prosecute the action it had commenced." *City of Fairbanks v. Electric Distribution System*, 413 P.2d 165, 168 (Alaska 1966). The denial of Denali's motion therefore had the effect of disposing of the case and ending the litigation. *See Mallonee v. Grow*, 502 P.2d 432, 434 n.2 (Alaska 1972) ("The effect of [denying a motion for a writ of execution] is that the plaintiff could not thereafter collect his judgment by execution."). The superior court's order "was a final judgment and appealable

as such." *City of Fairbanks*, 413 P.2d at 168; *see Mallonee*, 502 P.2d at 435 ("Since the order was a final one terminating the proceeding, we regard it as a final judgment from which an appeal may be taken.").

B. *The Fraudulent Conveyance Issue*

When a third party claims an interest in property against which a judgment creditor seeks to execute, the superior court must first determine the interests of the third party claimant. *See Keltner v. Curtis*, 695 P.2d 1076, 1079 n.4 (Alaska 1985). After this determination is made, "buyers at the execution sale will be certain that the judgment debtor is the sole owner of the property, and thus will not be discouraged from bidding what they think is the full value of the property." *Id.* In the present case Susanne Lange argued that she, and not judgment debtor William Lange, owned the property against which Denali sought to execute. In response, Denali raised genuine issues of material fact regarding whether William Lange's conveyance to Susanne Lange was fraudulent. *See Burgess v. Burgess*, 710 P.2d 417, 421 (Alaska 1985) ("[A] fraud is committed when one spouse, without consideration, transfers property to the other in order to place the property beyond the reach of creditors."). The fraudulent conveyance issue should have been resolved before the court ruled on Denali's motion. *Keltner*, 695 P.2d at 1079 n.4.

Furthermore, resolution of the fraudulent conveyance issue should have been by jury trial, since that is what Susanne Lange demanded. *Cf. Keltner*, 695 P.2d at 1079 ("[A] party to a proceeding adjudicating ownership of personal property should be entitled to a jury trial."). A jury trial demand, once made, may not be withdrawn without the consent of the other parties

to the action. Alaska R. Civ. P. 38(d); *see Hill v. Vetter,* 525 P.2d 529, 531 (Alaska 1974). On remand, absent such consent from Denali, the fraudulent conveyance issue must be tried by a jury.

IV. CONCLUSION

The superior court's denial of Denali's motion for a writ of execution is REVERSED. This case is REMANDED for a jury trial on the issue of whether William Lange's conveyance to Susanne Lange was fraudulent.

REVERSED and REMANDED.